

Editor's note: appealed sub nom. Atlantic Richfield v. Watt -- dismissed, Civ. No. 81-0615 (D. NM Nov. 29, 1990) --- see also Jicarilla Apache Tribe v. Supron Energy, 728 F.2d 1555 (10th Cir. 1984), on rehearing 782 F.2d 855 (1986), modified by 793 F.2d 1171 (1986), cert denied 479 US 970 (1986)

SUPRON ENERGY CORP.
ATLANTIC RICHFIELD CO.

IBLA 80-476

80-482

Decided June 26, 1981

Consolidated appeals from decisions of the Acting Deputy Commissioner, Indian Affairs, IND-23 O&G and IND-24 O&G, affirming decisions of the Geological Survey's Area Oil and Gas Supervisor, Albuquerque, New Mexico, establishing value for determining royalty on Ute Mountain Ute tribal leases and Southern Ute tribal leases.

Affirmed.

1. Accounts: Generally -- Geological Survey -- Indian Lands: Leases and Permits: Oil and Gas -- Indian Lands: Oil and Gas Leasing: Generally -- Laches -- Oil and Gas Leases: Royalties -- Payments: Generally

Where Geological Survey did not expressly state otherwise, under its policy established and in effect since 1958, royalty payments are accepted subject to post audit and correction and do not necessarily constitute payments in full of royalty obligations. The Area Supervisor's silence does not imply acceptance; nor does his inaction bar the Government from subsequently timely asserting the incorrectness of payment.

2. Geological Survey -- Indian Lands: Leases and Permits: Oil and Gas -- Indian Lands: Oil and Gas Leasing: Generally -- Oil and Gas Leases: Royalties

An appellant who challenges a determination by the Geological Survey as to the value of gas or other hydrocarbons produced from a Federal oil and gas lease

must show not merely that the methodology utilized by Geological Survey is susceptible to error; it must show that error did, in fact, occur.

3. Accounts: Generally -- Geological Survey -- Indian Lands: Leases and Permits: Oil and Gas -- Indian Lands: Oil and Gas Leasing: Generally -- Oil and Gas Leases: Royalties

An Area Supervisor's order which requires that royalty be based on either the price specified in the order or the amount actually received, whichever is greater, comports with all regulatory requirements as to definitiveness and finality.

Supron Energy Corp., 46 IBLA 181 (1980), cited and applied.

APPEARANCES: William S. Jameson, Esq., Dallas, Texas, for Supron Energy Corporation; Jason Kellahin, Esq., Santa Fe, New Mexico, for Atlantic Richfield Company; William R. Murray, Jr., Esq., Office of the Solicitor, for the Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Supron Energy Corporation (Supron) has appealed from a decision of the Acting Deputy Commissioner, Bureau of Indian Affairs, dated January 30, 1980 (IND-23-O&G), affirming two decisions of the Area Oil and Gas Supervisor, Geological Survey (Survey), requiring Supron to recompute royalties due under the Ute Mountain (Ute Mountain) Ute tribal leases and Southern Ute (Southern Ute) tribal leases for the years 1971 to 1973.

The first decision of the Oil and Gas Supervisor, dated April 27, 1977, had directed Supron to compute royalties under the Southern Ute leases on the basis of a price of not less than the yearly average price. The Supervisor informed Supron that the amounts to be utilized were 15 cents per Mcf for 1971; 20.0063 cents per Mcf for 1972; and 23.7077 cents per Mcf for 1973.

The second decision, rendered the following day, related to the Ute Mountain leases and provided for a base price of not less than 13.27 cents per Mcf for 1971, 14.95 cents per Mcf for 1972; and 21.09 cents per Mcf for 1973. It is important to note that to the extent that Supron had received a greater price for its gas than the yearly average price, and on which it had based its initial royalty tender, the price received was to control and no refund would be allowed.

Atlantic Richfield Company (Arco) appeals from a decision of the Acting Deputy Commissioner, Bureau of Indian Affairs, dated January 30, 1980 (IND-24-O&G), affirming a decision of the Area Oil and Gas Supervisor requiring Arco to recompute royalties due under Southern Ute tribal leases for the years 1971 to 1973. The decision of the Oil and Gas Supervisor had issued on April 27, 1977, and required, as had his decision to Supron of the same date, that recomputation occur on the basis of a price of not less than the yearly average price. The base prices were the same as those set forth in the decision to Supron, viz., 15 cents per Mcf for 1971; 20.0063 cents per Mcf for 1972; and 23.7077 cents per Mcf for 1973. Because the issues involved in these two appeals are the same, the Board has consolidated them for decisional purposes.

In effect, three basic arguments are made on appeal. First, appellants argue that the Department lacks the authority to retroactively adjust their royalty payments, citing Continental Oil Co. v. United States, 184 F.2d 804 (10th Cir. 1950).

Second, both appellants object to figures arrived at by the Oil and Gas Supervisor, though for slightly different reasons. Supron argues that the regulation, 25 CFR 171.13, clearly requires that the Oil and Gas Supervisor accept either the actual price received by the lessee or the price paid for a majority of similar quality production from the same field. Supron contends that the decision did not consider the value of production from the same field but rather determined the yearly average price for the gas sold from the Indian leases. Supron points out that the Federal Power Commission (FPC) had determined that "In the Rocky Mountain Area, about 75% of the gas is sold interstate and about 25% is sold intrastate" and argued that necessarily the majority of the gas in the same field would be limited to the maximum prices permitted by the FPC. ^{1/} Arco, for its part, argues that it was error to consider intrastate sales in arriving at a value determination. In support of this contention, it cites Brent v. Natural Gas Pipeline Co., 457 F. Supp. 155 (N.D. Tex. 1978), and Hemus v. Hawkins, 452 F. Supp. 861 (S.D. Tex. 1978), the latter expressly holding that interstate and intrastate sales are not comparable.

^{1/} Supron, while objecting to the Oil and Gas Supervisor's consideration only of gas sold from Indian leases, rather than "the same field" in determining the yearly average price, itself utilized an FPC decision relating to an entire area to generalize about specific "fields." While we are willing to assume, arguendo, that a majority of the gas from the relevant fields herein was sold in the interstate market, the fact that 75 percent of all gas in the Rocky Mountain area is so sold does not establish this as a fact.

Finally, Supron objects that a floor price such as was established by the Oil and Gas Supervisor does not constitute a final determination of value for royalty. It argues that a price not less than a specific amount is not such a final and conclusive determination of the royalty liability of the lessee as is required under the regulations and lease terms.

The issues and contentions raised by appellants in these appeals were considered at length in a decision of this Board, styled Supron Energy Corp., 46 IBLA 181 (1980), appeal pending sub nom. Conoco v. Andrus, Civ. No. 80-0261-M (D.N.M., filed April 17, 1980). While we will briefly discuss the issues herein, we wish to expressly adopt the more extensive analysis provided by our earlier decision.

[1] With respect to the argument relating to retroactivity, the Board noted in Supron Energy Corp., supra, that Survey bills lessees for royalty on the basis of the information contained in monthly reports which the lessees submit, subject to post audit, and noted that the silent acceptance of royalty when initially tendered does not constitute an express determination of the proper royalty level. Moreover, the Board recognized the practicalities involved in this question:

Our holding is in conformity with the realities of administering the collection of leases royalities. When GS receives a lessee's monthly statement of value, it cannot immediately know what the sales data for the entire field are, and it will necessarily take time to assemble this information and interpret it. Inaction during this time could reasonably indicate that the Department is considering whether to adopt these sales prices as adequate for "value" or, instead, to impose its own determination thereof on the lessees.

Id. at 190. Similarly, the Board distinguished Continental Oil Co. v. United States, supra, with respect to the instant question, noting that Continental Oil involved an attempt to retroactively rejudge a formal determination of gas value for royalty purposes 6 years after it had been announced. See Supron Energy Corp., supra at 190-91. In Supron, as in the instant appeal, there had been no actual determination of value for royalty purposes until the Supervisor's decision issued.

[2] With regard to the figures developed by the Oil and Gas Supervisor we wish to make a number of points. As noted above, Supron contends that while the regulation allows the Supervisor to elect either the price actually received by the lessee or the price paid for a majority of similar quality production from the same field, it does not permit the Supervisor to base valuation merely on the price received for the major portion of the gas sold from Indian leases.

Admittedly, there could well be a difference between the price paid for the major portion of the gas produced from a field and the price paid for the major portion of the gas produced from the Indian leases in the area. But if there is, it is appellants' obligation to establish this fact. Rather than focus on specific fields, however, Supron merely asserts that, since in all of the Rocky Mountain area 75 percent of the gas is sold interstate, the price of the majority of gas cannot be above the maximum prices permitted by the FPC. Even assuming that it is true that 75 percent of the gas sold in the Rocky Mountain area is sold in the interstate market, we fail to see how this established the price paid for the major portion of production from any field involved in this appeal.

When a party challenges a determination by the Survey as to the value of gas or other hydrocarbon produced, the party must not merely show that the methodology utilized by Survey is susceptible of error; it must establish that error did, in fact, occur. See generally Paul Kellerblock, 38 IBLA 160 (1978). This appellant has not done.

Insofar as Arco's argument on this point is concerned, this Board rejected the argument that it was improper to combine both intrastate and interstate sales in Supron Energy Corp., supra, and for the reasons set forth therein does so again. See Supron Energy Corp., supra at 191-92.

[3] Finally, we discussed the last issue raised by appellants herein in our earlier Supron decision. We noted:

We also reject lessees' argument that the Area Supervisor's orders are not final in that they set a minimum value for royalty but fail to set a maximum, and so avoid the final determination of value and leave the way open for further determinations. This is simply not true. The import of the orders is that the amount on which royalty must be determined is either the price specified in the order for a particular year, or the price at which the gas was actually sold, whichever is greater. There is no uncertainty or lack of finality in this, as both price figures are known. The orders might well have been phrased in a way which would have made this result clearer, but it is difficult to believe that lessees retain any bona fide doubt as to what the directive means at this stage of the proceeding. [Footnote deleted.]

Id. at 191. For the reasons given above, as well as those more fully elaborated in Supron Energy Corp., supra, we must reject appellants' arguments.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Bruce R. Harris
Administrative Judge

